

OFFICE OF ADMINISTRATIVE LAW

300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826
E-Mail: staff@oal.ca.gov

SUSAN LAPSLEY
Director

2008 JUN 11 AM 11:05



Date: June 11, 2008

To: Leonard Lang

From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 9(S)**
(CTU 2008-0421-02)

(Summary Disposition issued pursuant to Gov. Code, sec.
11340.5; Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging the amendment to California Code of
Regulations, title 14, section 2530(f)(4) by the Department of
Conservation, Division of Recycling

On April 21, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the amendment by the Department of Conservation, Division of Recycling (Department) to California Code of Regulations, title 14, section 2530(f)(4) is an underground regulation.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).¹ Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

California Code of Regulations, title 14, section 2530 deals with the reports recycling centers must submit. The current version of section 2530(f)(4) requires the recycler to report, for specified material, the "received weight" of recycling material. Your petition alleges that a previous version of the subsection required the "total weight" to be reported and that the amendment to "received weight" is not consistent with the intent of the previous version.

¹ Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

The following definitions shall apply to the regulations contained in this chapter:

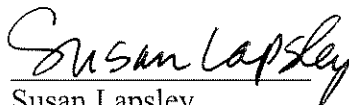
(a) "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, *but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA* and is not subject to an express statutory exemption from adoption pursuant to the APA. (Emphasis added)

The section you challenge as an underground regulation, California Code of Regulations, title 14, section 2530(f)(4), was originally adopted and filed with the Secretary of State on June 12, 1991. Subsection (f)(4) was subsequently amended to read "received weight," which is the current language of the subsection. This amendment was made pursuant to the requirements of the APA, and was filed with the Secretary of State on May 21, 1993.

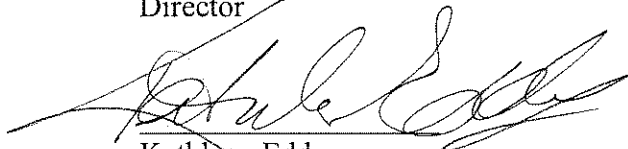
Section 2530(f)(4) has been adopted as a regulation and filed with the Secretary of State pursuant to the APA. The challenged rule is not, therefore, an underground regulation.²

The issuance of this summary disposition letter does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

Date: June 11, 2008



Susan Lapsley
Director



Kathleen Eddy
Senior Staff Counsel

²A rule which is contained in a properly adopted regulation is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review ... demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be used to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

(B) The challenged rule is contained in a California statute.

(C) *The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.*

(D) The challenged rule has expired by its own terms.